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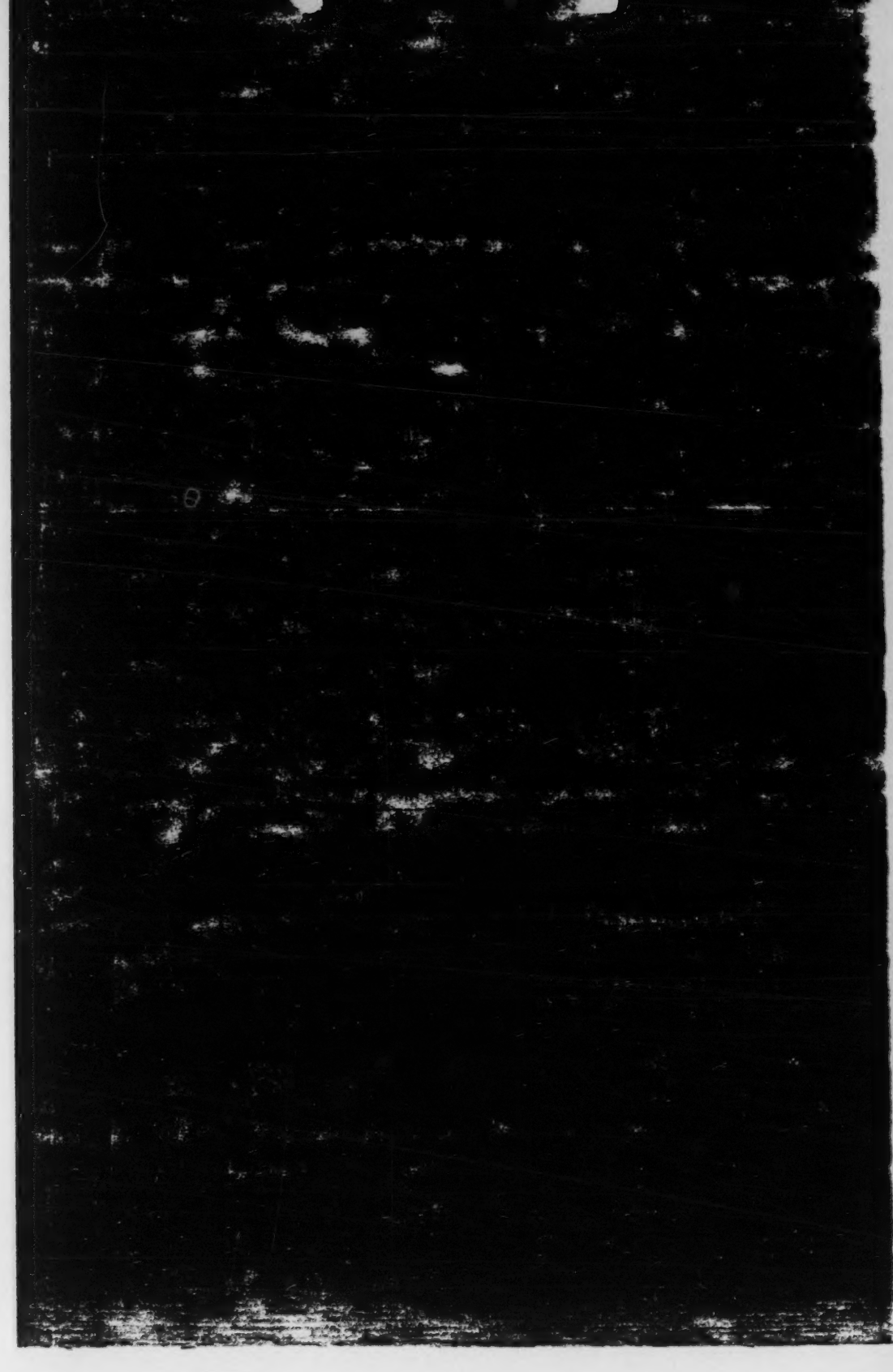

Supreme Court, U.S.
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No. 85-395

IN THE
SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1985

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A. L. LOCKHART, Director,
Arkansas Department of Correction.....Petitioner

vs

Carl Albert Collins.....Respondent

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MOTION FOR PROCEED IN FORMA PAUPERIS

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I, Thomas M. Carpenter, counsel for respondent herein, having been duly appointed pursuant to the 18 U.S.C. § 3006A, move to permit the respondent, Carl Albert Collins, to proceed in forma pauperis, and because of his poverty to be excused from prepaying the costs herein or give security therefor, in accordance with S.Ct.R. 46.1

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QUESTIONS PRESENTED

I. WHETHER THE EIGHTH CIRCUIT COURT'S GRANTING OF FEDERAL HABEAS CORPUS RELIEF TO RESPONDENT IGNORED A STATE PROCEDURAL BAR?

II. WHETHER THE EIGHTH CIRCUIT'S INTERPRETATION OF PECUNIARY GAIN AS AN ELEMENT OF THE CRIME IN ROBBERY-MURDER CASES ELIMINATES PECUNIARY GAIN AS AN AGGRAVATING CIRCUMSTANCE?

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BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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The respondent, Carl Albert Collins [hereafter Collins], denies that the petitioner [hereafter Lockhart] has raised an issue that merits this Court granting certiorari to review the decision below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reprinted in Exhibit A of the petition. The opinion is cited as Collins v. Lockhart, 754 F.2d 258 (8th Cir. 1985).

JURISDICTION

Collins agrees that a timely certiorari petition alleging jurisdiction pursuant to 28 U.S.C. § 1254(1) has been filed in

this matter. Collins does not concede that this allegation of jurisdiction is correct.

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides in relevant part:

> "[N]or cruel and unusual punishment inflicted."

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> "[N]or shall any state deprive any person of life liberty,or property without due process of law;"

STATEMENT OF THE CASE

Collins was charged with capital felony murder under a now repealed death penalty statute. Ark.Stat.Ann. § 43-4701, et seq (Supp. 1973). The State alleged that he committed a murder during the course of a robbery. Robbery, at that time, was defined in jury instructions as larcency by force for the purpose of personal gain.

Arkansas adopted a bifurcated sentencing process in death penalty cases in response to Furman v. Georgia, 408 U.S. 238 (1972). After being convicted of capital felony murder, Collins faced a sentencing proceeding before the same jury. Before that sentencing proceeding began, Collins' trial counsel objected to the use of the aggravating circumstance "pecuniary gain," [Ark.Stat.Ann. § 43-4711(e) (Supp. 1973)] because it tied "a part of the Act itself to determine punishment, [T.R. 257]." The trial court overruled this objection.

On appeal this point was not one of the listed errors, although it was reviewed on the merits by the Arkansas Supreme

Court as required under Ark.Stat.Ann. § 43-2725 (Repl. 1976). The issue was not found by the state court to be a basis for relief.

After unsuccessfully pursuing state appellate and post-conviction remedies, Collins filed a proper petition for writ of habeas corpus by a person in state custody. 28 U.S.C. § 2254. This petition was denied by the District Court. However, the Eighth Circuit returned the case to the District Court to permit the exhaustion of then unexhausted state claims. Collins v. Lockhart, 714 F.2d 1455 (8th Cir.1983). After exhausting pending state claims, the District Court again denied relief.

This time on appeal the Eighth Circuit addressed the issues raised in Collins appeal. It found that under Arkansas law in effect when Collins was tried, "pecuniary gain" was a necessary part of the robbery-murder that made Collins death eligible. Hence, use of that factor as an aggravating circumstance to separate those robbery murders that receive the death penalty from those that did not failed to meet the guidelines that this Court had established in Zant v. Stephens, 462 U.S. 862 (1983), and Godfrey v. Georgia, 446 U.S. 420 (1980). Accordingly, the Eighth Circuit vacated Collins' death sentence unless the state, in accordance with Arkansas law, decided to institute a new sentencing hearing.

Lockhart has petitioned for certiorari to review this limited ruling concerning now repealed state statutes. Contrary to Lockhart's assertion [Pet. at 4], Collins at worst will serve a sentence of life imprisonment without parole, and at best will have a new sentencing hearing in which the death penalty is again a possible result.

REASONS FOR DENYING THE WRIT

I. This case does not involve a state procedural bar. The State fails to understand that all objections raised in criminal trials involving sentences of life imprisonment or death are reviewed on the merits by the Arkansas Supreme Court. In light of this Court's ruling in Caldwell v. Mississippi, ___U.S.___. 105 S.Ct. 2633 (1985), the objection has been properly reserved and can be considered by the federal courts.

II. This case does not involve a split in the circuits, or an issue of substantial importance, that merits review by this Court on the issue concerning the aggravating circumstance "pecuniary gain." The opinion has limited impact and is consistent with the guidelines this Court has previously established.

ARGUMENT

I.

THIS COURT SHOULD DENY CERTIORARI BECAUSE THIS CASE DOES NOT INVOLVE PROCEDURAL DEFAULT AS ALLEGED BY LOCKHART.

Lockhart's initial argument is that Collins is procedurally barred from raising the "pecuniary gain" issue. Not only is the claim erroneous, but it fails to state any reason that this Court should grant certiorari on this issue. Even giving the argument the strongest possible inferences, no issue worthy of certiorari is presented.

Lockhart's argument is based on the premise that there was no objection at the trial level that was considered by the Arkansas Supreme Court. This premise is clearly wrong.

Furthermore, the argument Lockhart has made to this Court is inexcusably misleading.

Under Arkansas law objections are properly made if they inform the Court of the nature of the objection and the relief being sought. Ark.Stat.Ann. § 43-43-2725.1 (Repl. 1976). In criminal cases involving sentences of life imprisonment, life imprisonment without parole, or death, the Arkansas Supreme Court reviews all objections even if they are not listed as separate ponts on appeal. Ark.Stat.Ann. § 43-2725 (Repl. 1976). At the time of Collins conviction, the members of the Court personally reviewed every objection and determined if it constituted reversible error. See, Curry v. State, 270 Ark. 570, 605 S.W.2d 748 (1980). Indeed, the Court has even reversed cases on objections made at trial, even though that specific point was not argued on appeal, if the case fell within the purview of this statute. Gruzen v. State, 267 Ark. 380, 591 S.W.2d 342 (1980).

Hence, there is no procedural default on this issue since, as Lockhart concedes, an objection was made at trial. [Pet. at 6]. Further, the Eighth Circuit was entirely correct when it ruled that Ulster County Court v. Allen, 442 U.S. 140 (1979) controlled whether this issue could be reviewed. Also, see, Caldwell v. Mississippi. Moreover, Lockhart's reliance on Engle v. Issacs, 456 U.S. 107 (1982), and Wainwright v. Sykes, 433 U.S. 72 (1977), is totally unfounded since the defendants in both of those cases had failed to make any objection at the trial level.

Here Collins' objection to the use of the aggravating cirumstance "pecuniary gain," was raised immediately prior to the penalty hearing. [T.R. 256-257]. The specific request was that the court not instruct the jury that it could consider "pecuniary gain," as an aggravating circumstance in a capital murder case

where the underlying felony is robbery. The rationale of the objection was that use of a part of the act that made Collins' crime a capital felony was an improper basis for enhancing the punishment--i.e., imposing the death penalty. [T.R. 257].

To dispel Lockhart's contention that Collins' objection was somehow ambiguous [Pet. at 6], the objection is printed here:

> MR. LINEBERGER: Comes the defendant and objects to the instructions which we are informed the Court will give to the jury today, as to the punishment which is to be imposed upon the defendant, for the following reasons: (1) One of the items the jury could find to be an aggravating circumstance is No. 5: "capital felony was ...committed for pecuniary gain" It's the position of the defendant that you could never have a situation where a person was found guilty of capital felony murder where robbery was the felony involved and where there would not be a pecuniary gain. This is tying in a part of the Act itself to determine punishment, whereas that part should not be included as an aggravating circumstance....[T.R. 256-257]

The important point is that the objection clearly informs the trial court that Collins did not want to give the jury the opportunity to use pecuniary gain in a robbery murder case as an aggravating circumstance that could justify the death penalty.

In closing his argument on this point, Lockhart states that the Eighth Circuit's opinion rests of the "fiction" that the Arkansas Supreme Court actually considered the issue. [Pet. at 8]. In addition to the cases cited above, Lockhart ignores the reality of the following language of the Arkansas Supreme Court as to what its obligation was under Ark.Stat.Ann. § 43-2725 (Repl. 1976), Ark.S.Ct.R. 11(f), and Ark.R.Crim.P. 36.24 at the time of Collins conviction:

> Where life imprisonment or death was imposed in the court below, the Supreme Court reviews the entire record for errors prejudicial to the right of the appellant...This means that both the counsel for appellant and counsel for the State must examine the record page by page to be certain that all objections are brought to the Court's attention. For many years [including the time of Collins' appeal] the members of this Court made that examination in capital

cases....[Emphasis added][Explanation added] Singleton v. State, 274 Ark. 126,129, 623 S.W.2d 180,183 (1981).

In sum, there is no state procedural default in this case. The Eighth Circuit properly reviewed this matter in a federal habeas corpus appeal. There is no issue upon which certiorari should be considered, much less granted.

II.

THE COURT SHOULD DENY CERTIORARI BECAUSE THE VACATION OF COLLINS' DEATH SENTENCE IS IN ACCORDANCE WITH GUIDELINES PREVIOUSLY ESTABLISHED BY THIS COURT.

The ruling in this case concerning the "pecuniary gain" aggravating circumstance is extremely narrow. Indeed, only two people (Carl Collins and Billy Woodard) remain sentenced to death under this statutory scheme. The case is not of such a special nature as to merit the precious use of this Court's discretionary jurisdiction to review it. S.Ct.R. 17.1

Lockhart argues: (1) That this decision distorts the law of capital punishment; (2) That the Eighth Circuit misinterpreted Arkansas law in distinguishing Collins from Zant v. Stephens, 462 U.S. 862 (1983). These arguments are without merit. Before discussing this issue, a brief outline of the Arkansas procedure is in order.

In 1974 Arkansas had a bifurcated proceeding in death penalty cases. The jury first decided if a defendant were guilty of an offense that carried the death penalty. Ark.Stat.Ann. §§ 43-4701, et seq (Supp. 1973). If so, the jury then met again to determine penalty. The jury could consider as aggravating circumstances seven factors listed by the statute. The jury could consider anything it desired in mitigation. The jury would

then weigh aggravating and mitigating circumstances to determine: (1) If aggravating circumstances existed beyond a reasonable doubt; (2) If aggravating circumstances outweighed beyond a reasonable doubt any mitigating circumstaces found to exist; (3) If, after this weighing process, the death penalty was justified.

In this case the jury found three aggravating circumstances and one mitigating circumstance. The jury considered Collins' youth as a mitigating factor.

Initially, Lockhart argues that the Eighth Circuit is wrong when it concludes that robbery-murder necessarily involves pecuniary gain. Lockhart ignores the definition of robbery that was in effect at the time of this conviction. Or, as the prosecuting attorney argued at Collins' trial:

> You are instructed by the law that another aggravating circumstance that you shall consider is whether or not the commission of this particular crime was for pecuniary gain. You have already determined that yesterday....[Emphasis added][T.R. 288-89]

In Scifres v. State, 228 Ark. 486, 308 S.W.2d 815 (1958), the Arkansas Supreme Court approved the definition of robbery under the former criminal code--i.e., the code in effect at the time of this conviction. The instruction told the jury that robbery was a larceny by force that was committed for the purpose of personal gain. The crime, then, does concern the reason the item is taken--i.e., personal gain--as opposed to the value of the item taken.

In short, the Eighth Circuit analysis is not incorrect as Lockhart mistakenly believes.

Lockhart also argues that fourteen states have an aggravating circumstance similar to that in Arkansas and that seven states have indicated that use of that aggravating circumstance is appropriate. Or, stated another way, only half

of the states that have such a provision permit an element of the offense to be used in aggravation. (Even this characterization is suspect since the individual nature of each state's robbery statute must be considered).

Further, although alleging that distortions in capital sentencing procedures would occur, Lockhart fails to indicate how Collins decision would distort the law in these other states. For example, Florida and Georgia's sentencing schemes--i.e., two of the states listed by Lockhart--clearly would not be affected.

In Georgia, even if the robbery aggravating circumstance were set aside, the death penalty would not be vacated unless that was the only aggravating circumstance found. Zant v. Stephens, 462 U.S. 862 (1983). Likewise, the effect on the Florida statute would be limited in light of the review procedures established in Florida. Barclay v. Florida, 463 U.S. 939 (1983).

The constitutional purpose of an aggravating circumstance is "to circumscribe the class of persons eligible for the death penalty." Zant, ___ U.S. at ___, 103 S.Ct. at 2743. It is the presence of aggravating circumstances that explains why one defendant receives the more severe penalty of death when another death eligible defendant is only sentenced to life imprisonment. Godfrey v. Georgia, 446 U.S. 420 (1980). If the circumstance relied upon fails to so narrow this class, or is applied too broadly, then any death penalty so imposed is in violation of the Eighth and Fourteenth Amendments. Id.

When, as here, the aggravating circumstance does not narrow the class because it is one of the factors that places the defendant in the class, then it cannot withstand constitutional

scrutiny. The Eighth Circuit, thus, has merely applied this Court's previous rulings.

Finally, Lockhart argues that the Eighth Circuit erred in holding that the setting aside of an aggravating circumstance requires vacation of the death penalty under Arkansas law. There is no legal basis for this assertion. Indeed, it is directly contrary to established Arkansas law.

To support this argument Lockhart argues that the Arkansas Supreme Court has ruled that it would affirm death sentences if other aggravating circumstances are properly found. Henderson v. State, 281 Ark. 406, 664 S.W.2d 451 (1984).[Pet. at 15] The Arkansas court has not made any such ruling.

In Henderson the issue was whether counsel was ineffective for not challenging two robbery convictions that were entered during a period of time in which Henderson had been found insane by a Colorado court. In addition to these two convictions, the State had adequately proved four other violent felony convictions to meet the test of Arkansas' aggravating circumstance [Ark.Stat.Ann. § 41-1303(3) (Repl. 1977)]. The Court stated that failure to challenge the convictions did not mean that counsel was ineffective since there were other convictions to support the jury's finding. The full quote, which Lockhart failed to provide, is as follows:

> We do not find that counsel was ineffective for failing to raise the issue of petitioner's mental state in 1963. Even if the two robbery convictions were obtained while petitioner was suffering from psychosis, the failure of an aggravating circumstance does not invalidate a death sentence that is otherwise adequately supported by other proof of aggravating circumstances. See Zant v. Stephens, ___U.S.___, 103 S.Ct. 2733 (1983). Here, the four convictions from 1958 were sufficient to support the jury's finding that petitioner had previously committed another felony, an element of which was the use or threat of violence to another person or which created a substantial risk of death or serious physical injury. Ark.Stat.Ann. § 41-1303(3) (Repl. 1977).

[Emphasis added] Henderson v. State, 281 Ark. at ___, 664 S.W.2d at 451.

In short, Arkansas has not overruled its decisions in Miller v. State, 280 Ark. 551, 660 S.W.2d 163 (1983); Neal v. State, 274 Ark. 217, 623 S.W.2d 181 (1981); Williams v. State, 274 Ark. 9, 621 S.W.2d 686, cert.denied, 459 U.S. 1042 (1981); Giles v. State, 261 Ark. 413, 549 S.W.2d 479,cert.denied, 434 U.S. 894 (1977). Those decisions hold that if an aggravating circumstance is set aside, then the matter is returned for a new hearing if the State does not agree to a reduction to life imprisonment without parole.

(Further, unlike Lockhart's assertions to the contrary, these rulings are not mere evidentiary failures. In Williams the question was whether, as a matter of law, burglary qualified as a crime of violence).

The Arkansas rule that reduces death sentences to life imprisonment without parole is not involved in this Court's holding in Zant v. Stephens. Because the jury is supposed to weigh aggravating and mitigating circumstances to determine if a death penalty is justified beyond a reasonable doubt, the failure of an aggravating circumstance renders suspect a death penalty imposed by that jury. It is for this reason that Arkansas' statutory scheme was specifically excluded from the Zant ruling. 103 S.Ct. at 2741, n.12.

In sum, the Eighth Circuit has appropriately decided the "pecuniary gain," issue under Arkansas law, and has applied Arkansas law to fashion a remedy. Hence, certiorari is not appropriate in this case.

CONCLUSION

Certiorari is not appropriate in this case. For the foregoing reasons, this Court should deny the writ.

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